United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

74-1646

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

PAN AMERICAN WORLD AIRWAYS, INC.,
and TRANS WORLD AIRLINES, INC.,
Petitioners,

—against—

CIVIL AERONAUTICS BOARD,
Respondent.

ON PETITION FOR REVIEW OF ORDER OF THE CIVIL AERONAUTICS BOARD

REPLY BRIEF FOR PETITIONERS

CARL S. ROWE
HAROLD L. WARNER, JR.
Attorneys for Petitioners
30 Rockefeller Plaza
New York, New York 10020

JERRY W. RYAN
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

EDMUND E. HARVEY
1150 Seventeenth Street, N.W.
Washington, D.C. 20036

Of Counsel

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The Board in its brief has distorted the legislative history of the Act limiting the Board's power to authorize supplemental air carriers to engage in charter trips supplementing the scheduled service of the regular route carriers. As set forth herein, and in petitioners' main brief, the Board's foreign-originating TGC regulations are clearly in excess of the Board's statutory authority.

I

Direct Review of the Board's Regulation in This Court Is Authorized by Section 1006 of the Federal Aviation Act.

In footnote 10 of its brief, the Board suggests that this Court might disagree with the holding of the District of Columbia Circuit in *Deutsche Lufthansa Aktiengesellschaft* v. *CAB*, 479 F.2d 912, 916 (D.C. Cir. 1973), that agency regulations promulgated without a prior evidentiary hearing are directly reviewable by a court of appeals in situations "where evidence has been assembled before the agency and is not challenged, and where the issues presented are legal and not factual. City of Chicago v. Federal Power Comm'n, 147 U.S.App.D.C. 312, 458 F.2d 731, 740-741 (1971), cert. denied, 405 U.S. 1074, 92 S.Ct. 1495, 31 L.Ed.2d 808 (1972); *see also* Mobil Oil Corp. v. Federal Power Comm'n, 152 U.S.App.D.C. 119, 469 F.2d 130 (1972)."

Clearly, the District of Columbia Circuit would entertain the present petition as it did in *Saturn Airways, Inc.* v. *CAB*, 483 F.2d 1284 (D.C. Cir. 1973). The Board in fact does not even press its threshold question. No reason is advanced why this Court would disagree with the District of Columbia Circuit's ruling in *Deutsche Lufthansa Aktiengesellschaft*. "It is the availability of a record for review and not the holding of a quasi judicial hearing which is now the jurisdictional touchstone." (479 F.2d at 916).

Review here is authorized by Section 1006(a) of the Act:

> "Any order, affirmative or negative, issued by the Board . . . shall be subject to review by the courts of appeals of the United States or the United States Court of

> Appeals for the District of Columbia upon petition, filed within 60 days after the entry of such order, by any person disclosing a substantial interest in such order." (49 U.S.C. §1486(a)).

Manifestly petitioners have a substantial interest in the Board's regulation which extinguishes the difference between charter and individually ticketed travel.

II

The Board's Refined Definition of Charter Would Extinguish the Difference Between Charter and Individually Ticketed Travel.

Under the Board's foreign originating TGC regulations any passenger may purchase a ticket for point-to-point round trip air transportation provided only: (1) he becomes "contractually bound" to pay for his ticket at least ninety (90) days prior to flight departure (Tr. 89),* and (2) he accepts a minimum stay of 14 days during the peak traffic season (Tr. 90). Even the requirement that the passenger be "contractually bound" is illusory because there is no requirement that he make any advance deposit for his reservation and any deposit that is made is not required to be non-refundable. If no deposit is made, the passenger is therefore under no real risk of loss if he should desire to change his plans after his reservation is made.

The foregoing two "requirements" for what the Board refers to as TGC/ABCs are all that is left of the differences between TGCs and individually ticketed travel which the United States Court of Appeals for the District of Columbia

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* Effective August 12, 1974 the Board reduced this 90 day period to a 60 day period. Regulation SPR-78.

Circuit in *Saturn Airways, Inc., supra,* found taken together to be "substantial and vital." Plainly here "the indistinct line between group (charter) and individually ticketed travel has been crossed . . ." (483 F.2d 1284, 1288).

Apparently realizing the difficulty of distinguishing between TGC/ABCs and individually ticketed service, the Board attempts to re-write *American Airlines, Saturn* and the legislative history of the 1968 amendment. In place of the distinction between charter travel and individually ticketed service that was emphasized by the Court of Appeals of the District of Columbia in those cases and that was referred to repeatedly in the legislative history of the 1968 amendment, the Board now asserts that a service is "charter" if it is "a kind of service different from conventional airline service". For example, the Board claims that in connection with the 1968 amendment Congress stated that public solicitation was not inconsistent with the term "charter" so long as the service "was different in significant respects from conventional airline service." (Board Br., p. 38).*

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* Similar statements are made, for example, at pp. 37, 39 and in the section heading on p. 30 of the Board's brief. These statements refer to an excerpt from Senate Report No. 1567, 86th Congress, 2d Session, p. 5 (1960), that the Board's interim decision in the *Large Irregular Air Carrier Investigation* (Order No. E-9744, Nov. 15, 1955, 22 C.A.B. at 853-889) was based "on a finding that the public interest requires the establishment of a class of carriers authorized to perform supplemental air transportation of a kind and character which does *not* amount to a conventional, frequent, route-type service as provided by the major airlines." (The word "not" is inadvertently omitted in the Board's reference to Senate Report No. 1567 at p. 30 of the Board's brief.) This refers to a finding by the Board in an entirely different context and clearly does not constitute a legislative definition of the meaning of "charter". Moreover, the limited excerpt from the Senate Report, of course, omits significant portions of the Board's actual findings in the *Large Irregular Air Carrier Investigation* case. In fact, the Board there denied blanket authority to the Irregular Air Carriers to engage in passenger charter operations in international air transportation because this "might foster spurious charters" (22 C.A.B. at 865).

This is a complete distortion of that legislative history and of the holdings of those cases. It would permit the Board to call any service a "charter" if it differed in any significant respect whatsoever from conventional airline service. This would be giving the Board a blank check to define "charter"—clearly not the intent of Congress or of any court that has considered this question.

In fact, TGC/ABCs are not distinguishable from "conventional scheduled service" any more than from individually ticketed service.

Since the foreign-originating TGCs lack *three*—and realistically four*— of the five factors which the *Saturn* Court held served to differentiate TGCs from individually ticketed transportation, the Board admits that "the TGC/ABC amendment eliminates certain restrictions which the Board imposes on U.S.-originating TGCs."

The Board argues, however, that the amendment "includes some new conditions 'which are more restrictive than those presently contained in' the Board's TGC Rules." (Board's Br., p. 25).

But these allegedly "more restrictive" conditions, set forth in footnote 13 of the Board's brief, apply *only* to nonprorated TGC/ABCs. Even this limited application is of a *de minimis* nature. For example, it obviously does not matter that the peak season minimum stay is 14 rather than 10 days. As the Board itself has noted, "a group of people making a journey to a foreign country does so with the intention of remaining there for a matter of weeks rather than a few days." (22 C.A.B. at 865).

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* As pointed out above, since a passenger making a reservation need not make any advance deposit, he is, as a practical matter, not "contractually bound" at the time his reservation is made and the group is formed.

Whether one considers what remains of the five allegedly differentiating factors used by the *Saturn* Court or the purportedly "more restrictive" conditions applicable only to non-pro rata TGC/ABCs, there is clearly no practical distinction between TGC/ABCs and either individually ticketed service or "conventional scheduled service".

III

The Board's Statutory Authority May Not Be Enlarged by Considerations of Comity.

The Board states that its approach in adopting its foreign-originating TGC regulations was "designed, as a matter of comity, to recognize the validity of rules of foreign governments for charters originating in their territory . . ." (Board Br., p. 14).

The fact that certain foreign governments have adopted what the Board refers to as a TGC/ABC concept, however, does not empower the Board to ignore the requirements of the Act. If the U. S. supplemental carriers do not possess the legal authority to operate TGC/ABCs, then there is no reciprocity or comity basis for the grant of such rights to foreign carriers. It is Congress that has determined the competitive role to be played by the supplemental carriers—a role which can only be altered by Congress. This is a "matter of policy for Congress to decide." *Delta Air Lines, Inc.* v. *Summerfield*, 347 U.S. 74, 80 (1954). The "Board is entirely a creature of Congress and the determinative question is not what the Board thinks it should do but what Congress has said it can do." *CAB* v. *Delta Air Lines, Inc.*, 367 U.S. 316, 322 (1961).

IV

Congress Did Not Attempt to Determine Which Court of Appeals Correctly Decided the Inclusive Tour Cases.

At page 38 of its brief, the Board implies that the 1968 Congress, in authorizing the supplementals to engage in "inclusive tour charters" (P.L. 90-514, 82 Stat. 867), "in effect" concurred with the decision of the District of Columbia Circuit in *American Airlines, Inc.* v. *CAB*, 365 F.2d 939 (1966), and thereby rejected the opposite conclusion of this Court in *Pan American World Airways, Inc.* v. *CAB*, 380 F.2d 770 (1967), *aff'd per curiam* by an equally divided court *sub nom. World Airways, Inc.* v. *Pan American World Airways, Inc.*, 391 U.S. 461 (1968).

Congress took no such position on which Court decision was the correct one. This is made clear in House Report No. 1639, 90th Congress, 2d Session (pp. 2-3), which stated as follows:

> "As the status of the court cases would indicate, different interpretations of the congressional intent concerning Public Law 87-528 have been drawn.
>
> * * *
>
> "The committee's assessment of the present situation is that regardless of the legal arguments which have been and are taking place concerning CAB's past action, the supplemental air carriers should be allowed to provide the air transportation part of an inclusive tour, within the confines of part 378 of the Board's special regulations, as it exists today."

Thus when the House Report stated that the Board's power "is clarified, not enlarged here," it was simply re-

sponding to the request of the Board and the Department of Transportation that "the cloud which has been imposed by litigation should be lifted" (*id.* at p. 4). It was merely removing uncertainty as to the status of *inclusive tour charters.* Even the Board's own brief concedes that the statements of individual members of Congress to which the Board's brief refers, "were in terms addressed to inclusive tours" (Board Br., p. 39).

That "clarification" of the Board's power related solely to the status of inclusive tours is made explicit in the Senate Report also. The Committee reiterated its position stated at the time of the enactment of the 1962 legislation, as follows:

> " '[I]t is not the intention of the committee to permit individually ticketed service to be offered to the general public under the guise of charter. The proposed statutory definition, therefore, provides that charter shall not include such individually ticketed service whether offered by an air carrier directly or by a travel agent.
>
> " 'This restriction is subject to *one* exception because there is *one* circumstance in which a carrier or travel agent may offer the services to individual members of the public and still conform to the traditional concept of charter. This is in connection with an all-expense-paid group tour.' " (Sen. Rep. No. 1354, 90th Congress, 2d Session, p. 7).

This limited scope of P.L. 90-514 was emphasized in the debates in Congress. For example, Congressman Friedel, Chairman of the Subcommittee on Transportation and Aeronautics, stated:

> ". . . I want to make certain that the record is clear that the Committee on Interstate and Foreign Commerce

intends by this bill to clarify the Board's inclusive tour authority. It does not intend to enlarge the Board's authority." (114 Cong. Rec. 25058).

V

Congress Did Not Intend That Travel Agents Be Allowed to Sell Chartered Space to Individual Members of the Public.

The Board argues at pp. 34-39 of its brief that the "legislative history of the supplemental legislation shows that charter participants may properly be solicited from the general public." This is directly contrary to the relevant portions of that legislative history. As this Court held in *Pan American World Airways* v. *CAB, supra,* "To permit the selling of individual tickets to the general public in direct competition with the regularly scheduled airlines, regardless of whether such selling is done through the medium of a travel agent who has first 'chartered' the plane, does violate basic policies of the Act." (380 F.2d at 779).

That the Board's argument does not correctly depict the Congressional intent is also affirmed by the Senate Report on the 1968 amendment. That report made it clear that "nothing in the bill shall violate or change the rules and regulations as prescribed by the Civil Aeronautics Board on individual ticketing." (Sen. Rep. No. 1354, 90th Congress, 2d Session, p. 7).

As set forth in Senate Report No. 1354, *supra,* p. 7, the *one* exception in which a carrier or travel agent might offer services to individual members of the public was "in connection with an all-expense-paid group tour."

Congress thus intended that inclusive tour charters were to be the *one* and *only* exception to its prohibition against

the sale of chartered space to individual members of the public.

Congressman Staggers, Chairman of the Committee on Interstate and Foreign Commerce, also indicated the limited nature of Public Law 90-514. In response to an inquiry from another member of the Committee as to whether that law would relax the existing Board limitations upon inclusive tours, Mr. Staggers stated:

> "The provisions of the bill are intended to button it down specifically in the bill. To elaborate a little more upon what the distinguished gentleman from Virginia has said, the tour must stop at three intermediate points; the tour must last 7 days. The tour includes ground transportation at each stop. It includes hotel accommodations at each one of the stops and the package price must be at least, 110 percent of what a scheduled airline would charge for the air service between the points involved." (114 Cong. Rec. 25052).

Congressman Moss, another member of the Committee, stated:

> ". . . The report of the committee advises the Civil Aeronautics Board that any *modifications to the present regulations defining inclusive tour charter trips must clearly maintain the distinction between the inclusive tour charter services of the supplementals and the point-to-point, individually ticketed scheduled services of the route carriers.*" (114 Cong. Rec. 25053).

Thus the statute itself and the legislative history behind it makes it perfectly clear that the supplementals are to supplement and not engage in head-to-head competition with scheduled carriers, that such supplementation is to be in the form of *bona fide* group charters and that such ser-

vice is not to be offered to the general public directly or indirectly through travel agents or other intermediaries with but one specific exception—inclusive tour charters.

The Board refers to the statement of Senator Monroney that "This has nothing to do with individual ticketing . . . it is a lot different from walking out with your checkbook in hand, or your credit card, and saying: 'Give me a trip to Stockholm'."* In this statement Senator Monroney was referring to the inclusive tour charters—which required *three* intermediate points, with ground transportation and hotel accommodations at *each* stop, at a package price of *at least 110%* of the scheduled airline fare.

Today, however, under the foreign-originating TGC regulations, Mr. Monroney would not even need his checkbook when he walks out, 60 days before the flight, and says "Give me a round trip between London and New York."**

VI

The Viability of Petitioners' Scheduled Services Is Threatened.

Finally, the Board points to the dictum of the District of Columbia Circuit in the *Saturn* case:

> "[T]he consistent lamentations and predictions of doom by diversion raised by the scheduled air carriers in the past have proved, to our way of thinking, to be considerably overstated. The actions of the Board in this area have provided for steady growth in both the

* Hearings before the Aviation Subcommittee of the Senate Committee on Commerce at S. 3566, 90th Congress, 2d Session, p. 95 (June 12 and 13, 1968).

** Up to 15% of such passengers may do this on the eve of flight departure.

scheduled and supplemental markets, and the public, as it should be, has been the primary beneficiary." (483 F.2d at 1291-92).

With all due deference, petitioners respectfully submit that in place of this "steady growth" a more accurate picture of the current status of the international air transportation involved in this proceeding is as described by the Board's Chairman, Robert D. Timm:

> "International air transportation operations have of late resulted in serious losses for the world's airlines, and especially for U.S. international carriers.
>
> • • • • •
>
> "Part of the current problem is the dramatic decline in the international traffic, which, it must be stressed, is a real decline, and not simply a drop-off in growth rates. Secondly, in the North Atlantic market—the biggest international market of all—*increasing numbers of passengers are shifting to charter and other forms of group air travel.*
>
> • • • • •
>
> "The effect of these problems on the financial position of PAA and TWA, the two U.S. scheduled carriers which rely most heavily on their international business, is easy to imagine . . . For the first four months of 1974, Pan American's net loss after taxes was about $31 million. TWA's net loss for the same four months was even worse—$51 million."*

The current saturation of air transportation services over the North Atlantic gravely threatens the viability of peti-

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* Statement of Chairman Robert D. Timm before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, June 25, 1974, pp. 3-4.

tioners' scheduled services. It has led to cutthroat competition reminiscent of the era preceding adoption of the original Civil Aeronautics Act of 1938.*

By continual erosion of its definition of "charter," the Board has left no meaning to the provisions of §101(36)** of the Act (49 U.S.C. §1301(36)) expressly limiting the authority of the supplementals to "charter trips, including inclusive tour charter trips, in air transportation . . . to supplement the scheduled service" of the regular route carriers, such as petitioners. As a result, the supplementals and foreign charter carriers are now engaged in individually ticketed point-to-point competition with petitioners. A primary purpose of the 1962 legislation (P.L. 87-528, 76 Stat. 143) was:

> ". . . to maintain the regulatory scheme of the Federal Aviation Act and the protection of the certificated carriers such as petitioners by eliminating unregulated individually ticketed point-to-point competition from the supplementals." *American Airlines, Inc.* v. *CAB, supra,* 365 F.2d at 944-45.

The Board's foreign-originating TGC regulations thus thwart a primary purpose of the 1962 legislation.

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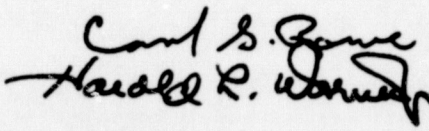
* "A major impetus to federal regulation of air transportation was the failure of the preceding era of freely competitive price and route warfare to bring stability to the Nation's air transport industry." (Dissenting opinion of Mr. Chief Justice Burger in *Hughes Tool Co.* v. *Trans World Airlines, Inc.,* 409 U.S. 363, 397 (1973)).

** Formerly §101(34) and renumbered §101(36) by Public Law 93-366, 88 Stat. 419, effective August 5, 1974.

CONCLUSION

The Board's foreign-originating TGC regulations should be set aside as exceeding the Board's statutory authority under the Act.

Respectfully submitted,



CARL S. ROWE
HAROLD L. WARNER, JR.
Attorneys for Petitioners
30 Rockefeller Plaza
New York, New York 10020

JERRY W. RYAN
1100 Connecticut Avenue, N.W.
Washington, D. C. 20036

EDMUND E. HARVEY
1150 Seventeenth Street, N.W.
Washington, D.C. 20036

Of Counsel

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Respondent.

CERTIFICATE OF SERVICE

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STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Harold L. Warner, Jr., being duly sworn, deposes and says:

1. I am attorney for petitioners in this case.

2. Pursuant to Rule 25(d) of the Federal Rules of Appellate Procedure, I hereby certify that I have served on counsel for each party separately represented two (2) copies of petitioners' reply brief in this case, in conformance with Rule 31(b) of the Federal Rules of Appellate Procedure, by mailing the same on this 1st day of November, 1974 addressed as follows:

Thomas J. Heye, Esq.
General Counsel
Civil Aeronautics Board
Washington, D. C. 20428

Carl D. Lawson, Esq.
Department of Justice
Washington, D. C. 20530

Robert M. Lichtman, Esq.
Lichtman, Abeles & Anker, P.C.
1730 M Street, N.W.
Washington, D. C. 20036
(Attorneys for National Air Carrier Association, Inc., Capitol International Airways, Inc., Overseas National Airways, Inc., Saturn Airways, Inc., Trans International Airlines, Inc. and World Airways, Inc.)

Thomas E. Kauper, Esq.
Assistant Attorney General
Department of Justice
Washington, D. C. 20530

Harold L. Warner, Jr.
Attorney for Petitioners
30 Rockefeller Plaza
New York, New York 10020

Subscribed and sworn
to before me this 1st
day of November, 1974.

Notary Public

GUSTAVE LOEHRING
Notary Public, State of New York
No. 24-6344500 Qualified in Kings County
Cert. filed in New York County
Commission Expires March 30, 1976